STAT [redacted] - CIA

Attached is the package that was delivered by messenger on September 29, 1988, to the senior official for information security oversight in each agency that creates or handles classified information. A copy of the package was also delivered at the same time to the agency point of contact responsible for the day-to-day operation of the program.

S Garfinkel
9/29/88

Copies of the mailing lists are available if necessary.

Information Security Oversight Office
Washington, DC 20405

September 29, 1988

Dear ⊠Salutation⊠:

The purpose of this letter is two-fold. First, it announces the issuance by the Information Security Oversight Office (ISOO) of a new "Classified Information Nondisclosure Agreement," the Standard Form 312. Second, it advises you of a clarification to previously executed copies of the Standard Form 189, also entitled "Classified Information Nondisclosure Agreement," and your requirement to communicate this clarification no later than October 27, 1988, to all employees who have previously executed the SF 189.

I. The Standard Form 312

In accordance with National Security Decision Directive 84 (NSDD 84), dated March 11, 1983, ISOO has today issued a rule that implements the Standard Form 312, "Classified Information Nondisclosure Agreement (SF 312). Effective immediately, the SF 312 shall serve as the instrument to fulfill the following requirement found in Paragraph 1(a) of NSDD 84: "All persons with authorized access to classified information shall be required to sign a nondisclosure agreement as a condition of access."

On December 29, 1987, ISOO imposed a moratorium on the further execution of nondisclosure agreements issued to implement NSDD 84. With respect to the SF 312, that moratorium is now lifted. Further, on August 21, 1987, ISOO imposed a moratorium on the withdrawal of access and security clearances of persons who are required to execute a nondisclosure agreement as a condition of access to classified information but who refuse to do so. With respect to the required execution of the SF 312, that moratorium also is lifted.

ISOO has issued the SF 312 to replace both the Standard Form 189, "Classified Information Nondisclosure Agreement" (SF 189), and the Standard Form 189-A, "Classified Information Nondisclosure Agreement (Industrial/Commercial/Non-Government)" (SF 189-A). However, executed copies of both the SF 189 and the SF 189-A remain valid, and fulfill that requirement of NSDD 84 quoted above. Therefore, you are required to obtain the execution of SF 312 by only those cleared Government and non-Government employees who have not previously signed either the SF 189 or SF 189-A.

Any person who has executed the SF 189 or SF 189-A may elect, however, to substitute a signed SF 312 for the previously executed agreement. You must take all reasonable steps to notify affected employees of this option, and, when an employee exercises it, to replace the previously signed nondisclosure agreement with the executed SF 312. ISOO strongly suggests the use of the enclosed "Notice to Employees," or a similar notice, for this purpose.

II. Modification of the SF 189

In accordance with a recent ruling of the United States District Court for the District of Columbia, ISOO has included in today's rule a provision that strikes the word "classifiable" from Paragraph 1 of each executed copy of the SF 189, while substituting language that clarifies the scope of "classified information," as used in the agreement. The rule also provides a definition of the scope of the term "classified information" in the SF 312, SF 189 and SF 189-A, and recites the basis for liability for violating any of these agreements. These references assure consistency in the enforcement of any of these agreements that implement NSDD 84.

On Friday, September 23, 1988, the court denied the Government's motion to substitute constructive notice through publication in the Federal Register for personal notice to every affected employee. Under the court's order, the Government must notify every employee who has executed the SF 189 of this clarification no later than October 27, 1988. When logistical circumstances do not permit compliance within that time frame for particular individuals, you should continue with efforts to notify them as quickly as possible. To assist you in meeting this notification requirement, we enclose a copy of a suggested notice, which is based upon the rule issued today. This notice, or one based upon it, may be reproduced in any format, and distributed as required. No actual physical alteration of the executed SF 189s is necessary, nor are agencies required to obtain receipts from employees that they have received notice.

The court order does not require that you notify former employees of this clarification, and, in the interest of seeking the most timely compliance, ISOO is also not imposing this requirement. Even without this notice, copies of the SF 189 executed by former employees will be enforced as the language in Paragraph 1 has been clarified.

ISOO is printing an initial stock of the SF 312 for distribution to the agencies. We will be working with your liaison to ISOO to make these arrangements. You should procure additional copies of the SF 312 through regular supply channels.

We enclose for your information and use a copy of the rule published in the Federal Register today that implements the SF 312, strikes the word "classifiable" and otherwise clarifies Paragraph 1 of the SF 189; ten sample copies of the SF 312; a copy of ISOO's suggested "Notice for Employees," taken from the published rule; and a series of questions and answers that should help answer many of your questions and the questions of employees that will arise regarding the SF 312. We are currently working on the production of a videotape and booklet that should prove to be useful briefing aids on the SF 312. We will notify you when they become available.

Please keep your ISOO liaison informed of the actions taken by your agency to implement the requirements set forth in this letter and rule. For answers to your questions, please contact ISOO at FTS 535-7251, or (202) 535-7251.

Sincerely,

Steven Garfinkel
Director

ØNameØ
ØTitleØ
ØAgencyØ
ØAddressØ
ØCityØ
ØStateØ

Enclosures

CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT

AN AGREEMENT BETWEEN _____ AND THE UNITED STATES

(Name of Individual - Printed or typed)

1. Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of my being granted access to classified information. As used in this Agreement, classified information is marked or unmarked classified information, including oral communications, that is classified under the standards of Executive Order 12356, or under any other Executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security; and unclassified information that meets the standards for classification and is in the process of a classification determination as provided in Sections 1.1(c) and 1.2(e) of Executive Order 12356, or under any other Executive order or statute that requires protection for such information in the interest of national security. I understand and accept that by being granted access to classified information, special confidence and trust shall be placed in me by the United States Government.

2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of classified information, including the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information have been approved for access to it, and that I understand these procedures.

3. I have been advised that the unauthorized disclosure, unauthorized retention, or negligent handling of classified information by me could cause damage or irreparable injury to the United States or could be used to advantage by a foreign nation. I hereby agree that I will never divulge classified information to anyone unless: (a) I have officially verified that the recipient has been properly authorized by the United States Government to receive it; or (b) I have been given prior written notice of authorization from the United States Government Department or Agency (hereinafter Department or Agency) responsible for the classification of the information or last granting me a security clearance that such disclosure is permitted. I understand that if I am uncertain about the classification status of information, I am required to confirm from an authorized official that the information is unclassified before I may disclose it, except to a person as provided in (a) or (b), above. I further understand that I am obligated to comply with laws and regulations that prohibit the unauthorized disclosure of classified information.

4. I have been advised that any breach of this Agreement may result in the termination of any security clearances I hold; removal from any position of special confidence and trust requiring such clearances; or the termination of my employment or other relationships with the Departments or Agencies that granted my security clearance or clearances. In addition, I have been advised that any unauthorized disclosure of classified information by me may constitute a violation, or violations, of United States criminal laws, including the provisions of Sections 641, 793, 794, 798, and *952, Title 18, United States Code, *the provisions of Section 783(b), Title 50, United States Code, and the provisions of the Intelligence Identities Protection Act of 1982. I recognize that nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

5. I hereby assign to the United States Government all royalties, remunerations, and emoluments that have resulted, will result or may result from any disclosure, publication, or revelation of classified information not consistent with the terms of this Agreement.

6. I understand that the United States Government may seek any remedy available to it to enforce this Agreement including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement.

7. I understand that all classified information to which I may obtain access by signing this Agreement is now and will remain the property of, or under the control of the United States Government unless and until otherwise determined by an authorized official or final ruling of a court of law. I do not now, nor will I ever, possess any right, interest, title, or claim whatsoever to such information. I agree that I shall return all classified materials which have, or may come into my possession or for which I am responsible because of such access: (a) upon demand by an authorized representative of the United States Government; (b) upon the conclusion of my employment or other relationship with the Department or Agency that last granted me a security clearance or that provided me access to classified information; or (c) upon the conclusion of my employment or other relationship that requires access to classified information. If I do not return such materials upon request, I understand that this may be a violation of Section 793, Title 18, United States Code, a United States criminal law.

8. Unless and until I am released in writing by an authorized representative of the United States Government, I understand that all conditions and obligations imposed upon me by this Agreement apply during the time I am granted access to classified information, and at all times thereafter.

9. Each provision of this Agreement is severable. If a court should find any provision of this Agreement to be unenforceable, all other provisions of this Agreement shall remain in full force and effect.

(Continue on reverse)

NOTICE

**TO ALL PERSONS WHO HAVE SIGNED THE STANDARD FORM 189
"CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT"
OR THE STANDARD FORM 189-A
"CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT
(INDUSTRIAL/COMMERCIAL/NON-GOVERNMENT)"**

1. By a rule issued by the Information Security Oversight Office, published in the Federal Register on September 29, 1988, implementing an order of the United States District Court for the District of Columbia, the second sentence of Paragraph 1 of every executed copy of the Standard Form 189, "Classified Information Nondisclosure Agreement," is clarified to read:

> As used in this Agreement, classified information is marked or unmarked classified information, including oral communications, that is classified under the standards of Executive Order 12356, or under any other Executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security; and unclassified information that meets the standards for classification and is in the process of a classification determination as provided in Sections 1.1(c) and 1.2(e) of Executive Order 12356, or under any other Executive order or statute that requires protection for such information in the interest of national security.

2. The Information Security Oversight Office has issued a new "Classified Information Nondisclosure Agreement," Standard Form 312, to be executed by all cleared Government and non-Government employees as a condition of access to classified information. The SF 312 will be used in lieu of the Standard Form 189, "Classified Information Nondisclosure Agreement," and the Standard Form 189-A, "Classified Information Nondisclosure Agreement (Industrial/Commercial/Non-Government)." Previously executed copies of the SF 189 and SF 189-A remain valid, and will be interpreted and enforced in a manner that is fully consistent with the interpretation and enforcement of the SF 312. Therefore, any cleared employee who has previously signed the SF 189 or the SF 189-A does not need to execute the SF 312. However, at that employee's discretion, he or she may elect to substitute a signed SF 312 for a previously signed SF 189 or SF 189-A.

3. Scope of "classified information": As used in the SF 312, the SF 189, and the SF 189-A, "classified information" includes marked or unmarked classified information, including oral communications, and unclassified information that meets the standards for classification and is in the process of a classification determination, as provided in Sections 1.1(c) and 1.2(e) of Executive Order 12356, or any other statute or Executive order that requires interim protection for certain information while a classification determination is pending. "Classified information" does not include unclassified information that may be subject to possible classification at some future date, but is not currently in the process of a classification determination.

4. Basis for liability: A party to the SF 312, SF 189 or SF 189-A may be liable for disclosing "classified information" only if he or she knows or reasonably should know that: (a) the marked or unmarked information is classified, or meets the standards for classification and is in the process of a classification determination; and (b) his or her action will result, or reasonably could result in the unauthorized disclosure of that information. In no instance may a party to the SF 312, SF 189 or SF 189-A be liable for violating its nondisclosure provisions by disclosing information when, at the time of the disclosure, there is no basis to suggest, other than pure speculation, that the information is classified or in the process of a classification determination.

5. For further information, please contact:

federal register

Thursday
September 29, 1988

Part VI

Information Security Oversight Office

32 CFR Part 2003

National Security Information; Standard Forms; Final Rule

INFORMATION SECURITY OVERSIGHT OFFICE

32 CFR Part 2003

National Security Information; Standard Forms

AGENCY: Information Security Oversight Office (ISOO).

ACTION: Final rule.

SUMMARY: This amendment to 32 CFR 2003.20 provides for: (1) the issuance and use of Standard Form 312, "Classified Information Nondisclosure Agreement" (SF 312); and (2) the modification of Paragraph 1 of all previously executed copies of Standard Form 189, "Classified Information Nondisclosure Agreement" (SF 189), to strike the word "classifiable" and to substitute in its place language that clarifies the scope of "classified information" as used in those agreements. From the effective date of this rule, the SF 312 shall be used in lieu of its predecessor nondisclosure agreements, SF 189 and Standard Form 189–A, "Classified Information Nondisclosure Agreement (Industrial/Commercial/Non-Government)" (SF 189–A). ISOO is issuing the SF 312 as a preferred means of clarifying the scope of some language in the SF 189 and the SF 189–A that has been at issue in litigation concerning the constitutionality and legality of certain nondisclosure agreements, including the SF 189. Notwithstanding the changes in some of its language, the SF 312 does not in any way differ from its predecessor nondisclosure agreements with respect to the substance of the information that each is intended to protect. ISOO is clarifying executed copies of the SF 189 to comply with a recent order of the United States District Court for the District of Columbia, to take account of statutory provisions that reflect congressional concern regarding possible ambiguity of the word "classifiable," and to make the language of the SF 189 more consistent with the language of the SF 312 and the SF 189–A.

EFFECTIVE DATE: September 29, 1988.

FOR FURTHER INFORMATION CONTACT: Steven Garfinkel, Director, ISOO, 202–535–7251.

SUPPLEMENTARY INFORMATION: This amendment to 32 CFR Part 2003 is issued pursuant to section 5.2(b)(7) of Executive Order 12356, "National Security Information," which grants the Director of ISOO the authority to issue standardized security forms, and Paragraph 1 of National Security Decision Directive 84, March 11, 1983, which directs ISOO to issue a standardized nondisclosure agreement to be signed as a condition of access by all persons cleared for access to classified information. In fulfilling this requirement, ISOO has previously issued two nondisclosure agreements: SF 189, "Classified Information Nondisclosure Agreement," in September 1983: and SF 189–A, "Classified Information Nondisclosure Agreement (Industrial/Commercial/Non-Government)," in November 1986.

On December 29, 1987, ISOO directed agencies to halt further implementation of the SF 189 and SF 189–A as a result of the enactment of section 630 of the Treasury, Postal Service, and General Appropriations Act, 1988, which was part of the Omnibus Continuing Resolution for Fiscal Year 1988 (Pub. L. 100–202). On May 27, 1988, in litigation primarily involving the constitutionality and legality of the SF 189, the United States District Court for the District of Columbia ruled that Section 630 of Public Law 100–202 is unconstitutional (*National Federation of Federal Employees v. United States, et al.*, Civil Action No. 87–2284–OG; *American Federation of Government Employees, et al. v. Garfinkel, et al.*, Civil Action No. 87–2412.OG; *American Foreign Service Association, et al. v. Garfinkel, et al.*, Civil Action No. 88–0440–OG). In a subsequent ruling of July 28, 1988, in the first two of the above-captioned cases, the same court upheld the constitutionality and legality of the SF 189. However, the court also ruled that in order to bring the scope of the word "classifiable" within constitutional limits, the SF 189 must be modified, either (a) by providing each signatory a copy of ISOO's definition of "classifiable information," as published in 52 FR 48367 on December 21, 1987; or (b) by striking the word from executed copies of the agreement. Notwithstanding these rulings upholding the validity of the predecessor nondisclosure agreements, ISOO has concluded that, in lifting the moratorium on the execution of required nondisclosure agreements, a preferred means to deal with the perceived ambiguities in their language is the issuance of a new nondisclosure agreement, the SF 312. The SF 312 avoids as many of these perceived problem areas as possible without changing the substance of the classified information that the nondisclosure agreement is intended to protect. In issuing the SF 312, ISOO does not seek its execution by every cleared Government or industry employee who has already executed an SF 189 or an SF 189–A, since these total over two million individuals. However, the rule provides that every individual who previously signed an SF 189 or SF 189–A may substitute a signed copy of the SF 312 at his or her own choosing. Also, through this rule ISOO is instructing agencies to enforce the predecessor agreements in a manner that is fully consistent with the enforcement of the SF 312. To help achieve greater consistency, ISOO is complying with the court order by opting to strike the word "classifiable" from the SF 189, while substituting language that clarifies the scope of "classified information," as used in the agreement. This language is taken from the definition of "classifiable" previously published in the Code of Federal Regulations, and adjudged by the District Court to bring the definition within constitutional and legal standards. ISOO has not included the word "classifiable" in the SF 312, and did not previously include it in the SF 189–A, although these agreements are both intended to protect the same information protected by the SF 189. The word "classifiable" had been included in the SF 189 not to introduce concepts separate and distinct from classified information, but to emphasize the need to protect unmarked classified information and information in the process of a classification determination. Therefore, striking the word from the SF 189 is the more consistent of the two options presented by the court, while its concepts remain protected within the scope of classified information.

Concurrent with the issuance of the SF 312, by a letter of this date the ISOO Director is instructing the senior official for information security oversight in each agency that creates or handles classified information to lift the current moratorium on the execution of the "Classified Information Nondisclosure Agreement," imposed by letter of December 29, 1987; and to lift the moratorium on the withdrawal of access to classified information and security clearances, imposed by letter of August 21, 1987, for those cleared persons who refuse to sign the SF 312.

Before issuing the SF 312, ISOO submitted drafts for review and comment to the executive branch agencies most affected by it; to seven Committees or Subcommittees of the Congress most involved with the subject of classified information; and to selected interest groups actively concerned with this subject. ISOO has considered those comments that it has received in response to its solicitations, and, when ISOO concluded that suggested changes were warranted, it has incorporated

transmit classified information to a person who is not authorized to receive it.

(2) As used in Paragraph 7 of SF 189, "information" refers to "classified information," exclusively.

(3) As used in the third sentence of Paragraph 7 of SF 189 and SF 189–A, the words "all materials which have, or may have, come into my possession," refer to "all classified materials which have or may come into my possession," exclusively.

(j) Each agency must retain its executed copies of the SF 312, SF 189, and SF 189–A in file systems from which the agreements can be expeditiously retrieved in the event that the United States must seek their enforcement. The copies or legally enforceable facsimiles of them must be retained for 50 years following their date of execution. An agency may permit its contractors, licensees and grantees to retain the executed agreements of their employees during the time of employment. Upon the termination of employment, the contractor, licensee or grantee shall deliver the SF 312, SF 189, or SF 189–A of that employee to the Government agency primarily responsible for his or her classified work.

(k) Only the National Security Council may grant an agency's request for a waiver from the use of the SF 312. To apply for a waiver, an agency must submit its proposed alternative nondisclosure agreement to the Director of ISOO, along with a justification for its use. The Director of ISOO will request a determination about the alternative agreement's enforceability from the Department of Justice prior to making a recommendation to the National Security Council. An agency that has previously received a waiver from the use of the SF 189 or the SF 189–A need not seek a waiver from the use of the SF 312.

(l) The national stock number for the SF 312 is 7540–01–280–5499.

Dated: September 23, 1988.

Steven Garfinkel,

Director, Information Security Oversight Office.

[FR Doc. 88–22232 Filed 9–26–88; 8:45 am]

BILLING CODE 6820–KC–M

Information Security Oversight Office
Washington, DC 20405

STANDARD FORM 312
CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT

Q: What is the Information Security Oversight Office?

A: The Information Security Oversight Office (ISOO), established by Executive Order 12065 (December 1, 1978) and continued under Executive Order 12356 (April 6, 1982), is responsible for monitoring the information security programs of all executive branch departments and agencies that create or handle national security information. In National Security Decision Directive No. 84, March 11, 1983, the President directed ISOO to develop and issue a standardized classified information nondisclosure agreement to be executed by all cleared persons as a condition of access to classified information.

Q: What is the purpose of a nondisclosure agreement?

A: The primary purpose of a nondisclosure agreement is to inform employees of (a) the trust that is placed in them by providing them access to classified information; (b) their responsibilities to protect that information from unauthorized disclosure; and (c) the consequences that may result from their failure to meet those responsibilities. Secondly, by establishing the nature of that trust, those responsibilities, and those consequences in the context of a contractual agreement, if that trust is violated, the United States will be in a better position to prevent unauthorized disclosures or to discipline employees responsible for such disclosures by initiating a civil or administrative action.

Q: Upon what legal authority is the SF 312 based?

A: The direct legal bases for the issuance of SF 312 are Executive Order 12356, in which the President authorizes the Director of ISOO to issue standardized security forms; and National Security Decision Directive No. 84 (NSDD 84), in which the President directs ISOO to issue a standardized classified information nondisclosure agreement. Both E.O. 12356 and NSDD 84 are based on the President's constitutional responsibilities to protect national security information. These responsibilities derive from the President's powers as Chief Executive, Commander-in-Chief, and the principal architect of United States foreign policy.

Nondisclosure agreements have consistently been upheld by the Federal courts, including the Supreme Court, as legally binding and constitutional. At every stage of the development and implementation of the SF 312 and its predecessors, the SF 189 and the SF 189-A, experts in the Department of Justice have reviewed their constitutionality and enforceability under existing law. The most recent litigation over the SF 189 resulted in a decision that upheld its basic constitutionality and legality.

Q: Who must sign the SF 312?

A: As provided in National Security Decision Directive No. 84, dated March 11, 1983: "All persons with authorized access to classified information shall be required to sign a nondisclosure agreement as a condition of access." Therefore, each person at the time that he or she is cleared for access to classified information, or each person who has been cleared previously and continues to require access to classified information must sign the SF 312, unless he or she has previously executed one or more of the following:

(a) The SF 189, for cleared employees in both Government and industry;

(b) The SF 189-A, for cleared employees within industry; or

(c) A nondisclosure agreement for which the National Security Council has granted a waiver from the use of the SF 312, the SF 189 or the SF 189-A, as provided in 32 CFR § 2003.20.

By tradition and practice, United States officials who hold positions prescribed by the Constitution of the United States are deemed to meet the standards of trustworthiness for eligibility for access to classified information. Therefore, the President, the Vice President, Members of Congress, Supreme Court Justices, and other federal judges appointed by the President and confirmed by the Senate need not execute the SF 312 as a condition of access to classified information.

Q: Are all Members of Congress, as constitutionally elected office-holders, entitled to unlimited access to classified information?

A: No. Access to classified information is a function of three pre-conditions: A determination of a person's trustworthiness, i.e., the security clearance; (2) the signing of an approved nondisclosure agreement; and (3) the exercise of the "need-to-know" principle, i.e., access is necessary in order to perform one's job. Members of Congress, as constitutionally elected officials, are not ordinarily subject to clearance investigations nor does ISOO's rule implementing the SF 312 require that Members of Congress sign the SF 312 as a condition of access to classified information. Members of Congress are not exempt, however, from fulfilling the "need-to-know" requirement. They are not inherently authorized to receive all classified information, but agencies provide access as is necessary for Congress to perform its legislative functions, for example, to members of a committee or subcommittee that oversees classified executive branch programs. Frequently, access is governed in these situations by ad hoc agreements or rules to which the agency head and the committee chairman agree.

The three basic requirements for access to classified information mentioned in the opening paragraph apply to congressional staffs as well as executive branch employees. ISOO's regulation implementing the SF 312 provides that agency heads may use it as a nondisclosure agreement to be signed by non-executive branch personnel, such as congressional staff members. However, agency heads are free to substitute other agreements for this purpose.

Q: Is an employee who signed an SF 312, SF 189 or SF 189-A in a prior position required to sign an SF 312 in a new position that also involves access to classified information?

A: The SF 312 and its predecessors have been purposely designed so that new nondisclosure agreements need not be signed upon changing jobs. Therefore, ordinarily the answer is no. However, if the location and retrieval of a previously signed agreement cannot be accomplished in a reasonable amount of time or with a reasonable amount of effort, the execution of the SF 312 may be practicable or even necessary. Also, a person who has signed the SF 189-A, which was designed exclusively for non-Government employees, would be required to sign the SF 312 if he or she began working for a Government agency in a position that required access to classified information.

Q: Should a person who does not now have a security clearance but who may very well have such a clearance in the future sign the SF 312?

A: No. The SF 312 should be signed only by persons who already have a security clearance or are being granted a security clearance at that time. It is inappropriate to have any uncleared person sign the SF 312, even if that person may have a need to be cleared in the near future.

Q: Should a person who has a security clearance but has no occasion to have access to classified information be required to sign the SF 312?

A: Since every cleared person must sign a nondisclosure agreement, the routine answer to this question is "yes." However, in implementing this program, ISOO has learned of a number of cleared employees who questioned executing a nondisclosure agreement on the basis that they had not had access to classified information over a lengthy period of time. Persons who do not require access to classified information should not have or retain security clearances. Therefore, the agency or contractor in such a situation should first determine the need for the retention of the security clearance. If its retention is unnecessary or speculative, the clearance should be withdrawn through established procedures and the employee should not sign the SF 312. If the agency or contractor determines a legitimate, contemporaneous need for the employee's clearance, the employee must sign the SF 312. In these situations, the agency or contractor must be prepared to justify the need for the clearance, since the affected employee may continue to resist executing the SF 312 on the basis that he or she has not had access to classified information.

Q: How much time should an agency or contractor provide an employee to decide whether to sign the SF 312?

A: In all situations, the answer to this question should be governed by what is reasonable under the circumstances. The following examples are illustrative. Because examples such as these and others may result in adversarial proceedings, written documentation of the transaction between the agency/contractor and the employee is critical. Also, in any situation in which there is a delay in the execution of the SF 312, the employee should be briefed on the criminal, civil or administrative consequences that may result from the unauthorized disclosure of classified information, even though the individual has not signed a nondisclosure agreement.

Example I: An employee declares explicitly that under no circumstances will he or she execute the SF 312. He or she should be advised again of the consequences of that decision. If he or she maintains the same position, the agency or contractor should take immediate steps to deny further access to classified information and to initiate the revocation of the clearance.

Example II: An employee requests additional time to consider his or her decision. He or she should be afforded a reasonable period of time to do so. If the requested additional time is 15 days or less, the agency or contractor should ordinarily grant it and make a written record of the established deadline. If the requested period of time is greater than 15 days, what that period of time will be should be discussed between the agency/contractor and employee, and a decision made, recorded, and communicated to the employee before the time begins.

Example III: An employee requests an opportunity to consult with outside counsel. He or she should be afforded a reasonable period of time in which to do so. What that period of time will be should be discussed between the agency/contractor and employee, and a decision made, recorded, and communicated to the employee before the time begins.

Example IV: An employee submits questions about the SF 312, which are reasonable both in number and in content, and requests written answers. He or she should be given a reasonable time to review those answers before any action adverse to the employee is undertaken. If the requested additional time after receipt of the answers is 15 days or less, the agency or contractor should ordinarily grant it and make a written record of the established deadline. If the requested period of time is greater than 15 days, what that period of time will be should be discussed between the agency/contractor and employee, and a decision made, recorded, and communicated to the employee before the time begins.

Q: What steps should be taken if a person who has not signed either the SF 189 or SF 189-A refuses to sign the SF 312?

A: As provided by presidential directive, the execution of an approved nondisclosure agreement shall be a condition of access to classified information. Therefore, an agency shall take those steps that are necessary to deny a person who has not executed an approved nondisclosure agreement any further access to classified information. In accordance with agency regulations and procedures, the affected party's security clearance shall either be withdrawn or denied. For purposes of meeting this condition for access, the approved nondisclosure agreements include any of the following:

(a) The SF 312, for cleared employees in both Government and industry;

(b) The SF 189, for cleared employees in both Government and industry;

(c) The SF 189-A, for cleared employees within industry; or

(d) A nondisclosure agreement for which the National Security Council has granted a waiver from the use of the SF 312, the SF 189 or the SF 189-A, as provided in 32 CFR § 2003.20.

Q: How does the SF 312 differ from the SF 189 and SF 189-A?

A: The most obvious difference between the SF 312 and the SF 189 or SF 189-A is that the SF 312 has been designed to be executed by both Government and non-Government employees. The SF 312 differs from the SF 189 and SF 189-A in several other ways as well.

First, the term "classifiable information," which has now been removed from paragraph 1 of the SF 189 by regulation, does not appear in the SF 312.

Second, the modifiers "direct" and "indirect," which appear in Paragraph 3 of both the SF 189 and SF 189-A, do not appear in the new nondisclosure agreement.

Third, the "Security Debriefing Acknowledgement," which appears in the SF 189-A but not the SF 189, is included in the SF 312. Its use is optional at the discretion of the implementing agency.

Fourth, the SF 312 includes specific references to marked or unmarked classified information and information that is in the process of a classification determination. These references have now been added to the SF 189 by regulation.

Fifth, the SF 312 specifically references a person's responsibility in situations of uncertainty to confirm the classification status of information before disclosure.

The SF 312 also contains several other editorial changes which clarify perceived ambiguities in the predecessor forms. Notwithstanding these changes, the SF 312 does not in any way differ from the SF 189 and SF 189-A with respect to the substance of the classified information that each has been designed to protect.

Q: For purposes of the SF 312, what is "classified information?"

A: As used in the SF 312, the SF 189, and the SF 189-A, "classified information" is marked or unmarked classified information, including oral communications; and unclassified information that meets the standards for classification and is in the process of a classification determination, as provided in Sections 1.1(c) and 1.2(e) of Executive Order 12356 or under any other Executive order or statute that requires interim protection for certain information while a classification determination is pending. "Classified information" does not include unclassified information that may be subject to possible classification at some future date, but is not currently in the process of a classification determination.

The current Executive order and statute under which "classified information," as used in the SF 312, is generated are Executive Order 12356, "National Security Information," and the Atomic Energy Act of 1954, as amended.

Q: What is the threshold of liability for violating the nondisclosure provisions of the SF 312?

A: A party to the SF 312, SF 189 or SF 189-A may be liable for disclosing "classified information" only if he or she knows or reasonably should know that: (a) the marked or unmarked information is classified, or meets the standards for classification and is in the process of a classification determination; and (b) his or her action will result, or reasonably could result in the unauthorized disclosure of that information. In no instance may a party to the SF 312, SF 189 or SF 189-A be liable for violating its nondisclosure provisions by disclosing information when, at the time of the disclosure, there is no basis to suggest, other than pure speculation, that the information is classified or in the process of a classification determination.

Q: Why was the term "classifiable" not included in the SF 312?

A: The term "classifiable," as originally used in Paragraph 1 of the SF 189, was not included in the SF 312 to avoid the confusion that arose over the intended scope of that word. The "able" suffix in the word "classifiable" promoted the incorrect interpretation that the word referred to unclassified information that might be classified in the future. Rather, the term "classifiable information" was intended and defined to encompass two narrow classes of information that must be protected under Executive Order 12356, "National Security Information." These are (a) unmarked classified information, including oral communications; and (b) unclassified information that meets the standards for classification and is in the process of a classification determination. In response to a recent order of the United States District Court for the District of Columbia, the word "classifiable" has now been struck from the SF 189 and replaced with language consistent with its previously published definition. The same language is included in the SF 312. Further, in accordance with a rule issued by the Information Security Oversight Office, the SF 189 and the SF 189-A shall be interpreted and enforced in a manner that is fully consistent with the interpretation and enforcement of the SF 312.

Q: May the language of the SF 312 be altered to suit the preferences of an individual signer?

A: No. The SF 312 as drafted has been approved by the National Security Council as meeting the requirements of NSDD 84, and by the Department of Justice as an enforceable instrument in a court of law. An agency may not accept an agreement in which the language has been unilaterally altered by the signer.

Q: Does the SF 312 conflict with the "whistleblower" statute?

A: The SF 312 does not conflict with the "whistleblower" statute (5 U.S.C. § 2302). The statute does not extend its protection to employees who disclose classified information without authority. If an employee knows or reasonably should know that information is classified, provisions of the "whistleblower statutes" should not protect that employee from the consequences of an unauthorized disclosure.

In addition, Executive Order 12356, Sec. 1.6(a), specifically prohibits classification "in order to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interest of national security." This provision was included in the Order to help prevent the classification of information that would most likely be the concern of whistleblowers.

Finally, there are remedies available to whistleblowers that don't require the unauthorized disclosure of classified information. There are officials within the Government who are both authorized access to classified information and who are responsible for investigating instances of reported waste, fraud, and abuse. Further, each agency has designated officials to whom challenges to classification may be addressed or to whom a disclosure of classified information is authorized. For example, within the Department of Defense employees are now required to challenge the classification of information that they believe is not properly classified. Special procedures have been established to expedite decisions on these challenges.

Q: Must a signatory to the SF 312 submit any materials that he or she contemplates publishing for prepublication review by the employing or former employing agency?

A: No. There is no explicit or implicit prepublication review requirement in the SF 312, as there is none in the SF 189 and SF 189-A. However, if an individual who has had access to classified information is concerned that something he or she has prepared for publication may contain classified information, that individual should be encouraged to submit it to his or her current or last employing agency for a voluntary review. In this way the individual will minimize the possibility of a subsequent action against him or her as a result of an unauthorized disclosure.

Q: How long do agencies and contractors have to fulfill the requirement to implement the execution of the SF 312 by cleared employees?

A: In issuing the SF 312, ISOO is not establishing at this time a firm deadline for full agency and contractor compliance. However, ISOO encourages agencies that are responsible for Government and non-Government compliance to impose deadlines consistent with logistical realities. ISOO will continue to monitor agency compliance to help ensure that full implementation is achieved in a timely manner.

Further, it should be noted that the effort to achieve full compliance within Government agencies should not be particularly burdensome. At the time ISOO imposed a moratorium on the execution of further copies of the SF 189 at the end of 1987, agencies had reported compliance that approximated 98-99% of the persons required to execute the nondisclosure agreement. To achieve full compliance within Government agencies will require the execution of the SF 312 by the remaining one or two percent of employees; by those employees who have been cleared for access to classified information since the imposition of the moratorium; and by newly cleared employees.

ISOO does not have comparable data for the degree of compliance within industry at the time of the imposition of the moratorium. The Defense Investigative Service and other agencies that are responsible for the security administration of classified contracts, licenses and grants should establish deadlines for full compliance.

Q: What kind of briefing or other information should an agency offer at the time a person is asked to sign the SF 312?

A: At the time an employee is asked to sign the SF 312, the agency or contractor should provide a briefing that, at a minimum, provides information about: (a) the purposes of the nondisclosure agreement; (b) the intent and scope of its provisions; (c) the consequences that will result from the employee's failure to sign the agreement; and (d) the consequences that may result from the unauthorized disclosure of classified information, including possible administrative, civil, or criminal sanctions. In this context, the briefing should explain clearly the procedures to be followed in ascertaining whether a prospective recipient may have access to classified information.

The briefing may be limited to the subject of the SF 312, or it may be in the context of an initial or refresher briefing about the information security system, generally. While the heart of the briefing may be based upon a prepared text or audiovisual, the agency or contractor representative should answer any reasonable questions or concerns raised by the individual regarding the SF 312, or be prepared to obtain answers to those questions. The representative must also have available copies of every statute, executive order or regulation that is referenced in Paragraph 10 of the SF 312.

Q: If a person who has previously signed the SF 189 or SF 189-A opts to sign and substitute the SF 312, must he or she also receive another briefing?

A: The agency or contractor is not required to provide an additional briefing upon execution of the SF 312 in these circumstances. However, the agency or contractor representative should answer any reasonable questions or concerns raised by the individual regarding the SF 312, or be prepared to obtain answers to those questions. The representative should also have available copies of every statute, executive order or regulation that is referenced in Paragraph 10 of the SF 312.

Q: What steps must an agency or contractor take to substitute a signed SF 312 for a signed SF 189 or SF 189-A? If requested, must the agency or contractor return the previously signed form to the signatory?

A: In the event that a signatory opts to substitute a signed SF 312 for a previously signed SF 189 or SF 189-A, the agency or contractor shall dispose of the SF 189 or SF 189-A, either through its physical destruction or, if requested, through its return to the signatory, if these means of disposal can be accomplished with a reasonable amount of effort or expenditure of resources. In situations in which physical disposal is not a reasonable alternative, the agency or contractor shall take all reasonable steps to annotate the retained version of the SF 189 or SF 189-A with markings that make clear that it has been voided; and provide the signatory with an official written statement to that effect. In extraordinary circumstances in which none of the alternatives above is reasonable, the agency or contractor shall provide the signatory with an official written statement that the retained SF 189 or SF 189-A is void. In any circumstances, the SF 189 or SF 189-A should not be destroyed or voided until <u>after</u> the employee has executed the SF 312.

Q: How long must executed copies of the SF 312 be retained? Where must they be stored? Can they be retained in a form other than the original paper copy?

A: The originals or legally enforceable facsimiles of SF 312 must be retained for 50 years following the date of execution. Ordinarily, microforms and other reproductions are legally enforceable in the absence of the originals. Each agency must retain its executed copies of SF 312 in a file system from which the agreement can be expeditiously retrieved in the event that the United States must seek their enforcement. Official personnel files, both for civilian and military service, ordinarily are not scheduled for preservation for a sufficient period of time to allow them to be used for this purpose.

The retention of the nondisclosure agreements by contractors shall be governed by instructions issued by the Defense Investigative Service or other agency that is responsible for security administration of the contractor's classified contracts. These instructions must take into account the retention and retrieval standards discussed above.

Q: May the signer keep a copy of the executed SF 312?

A: Ordinarily, a signer of the SF 312 who requests a copy of the executed form may keep one. Only in the extraordinary situation in which one of the signatures on the agreement reveals a classified relationship, resulting in the classification of that particular form, may the signer not keep a copy.